STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2011
v	No. 292570 Saginaw Circuit Court
JAMES MICHAEL O'BRYAN, Defendant-Appellant.	LC No. 08-031573-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and larceny from a person, MCL 750.357.[1] The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 80 to 120 years' imprisonment for each conviction; the sentences to be served concurrently. Defendant appeals as of right. We affirm.

I. BASIC FACTS

On August 9, 2008, the body of the victim, Joe Ramirez, was found in his apartment. Statements from the victim's friends led Detective Ryan Oberle, one of the investigating officers, to defendant. After he was arrested, defendant admitted to Oberle and another detective that he attacked the victim. He stated that he did so because he was offended after the victim referred to him as "my bitch." Defendant also admitted that he took a stereo from the victim's apartment.

II. HEARSAY AND RIGHT OF CONFRONTATION

Defendant argues that his rights of confrontation and due process were violated when the trial court admitted testimonial statements from nontestifying witnesses, inadmissible hearsay, opinion testimony, and testimony not based on personal knowledge. While we agree that some

[1] The jury was instructed on second-degree murder and larceny from a person as lesser included offenses of the charged crimes of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529.

of the challenged out-of-court statements and trial testimony was inadmissible, defendant has not shown that he was prejudiced by any error.

Defendant did not object at trial to the challenged testimony. Thus, the claims of error are unpreserved. We review unpreserved constitutional and nonconstitutional issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A defendant must show that a clear or obvious error occurred and that the error prejudiced him, i.e., that the error affected the outcome of the proceedings. *Id.* at 763.

Defendant first challenges the testimony of Oberle that friends of the victim told him that "Jim" had been involved in another altercation and that a police report regarding that altercation identified "Jim" as defendant. Defendant claims that Oberle's testimony contained inadmissible hearsay and violated his right of confrontation.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement that is not offered for the truth of its contents is not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). Specifically, an out-of-court statement that is used to show its effect on the hearer is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982) (holding that an out-of-court statement was not hearsay when offered to show the reason for the presence of the police officers at the scene). In addition, while the Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination, *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), it "does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted," *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007).

Here, the out-of-court statements of the victim's friends and those contained in the police report, as testified to by Oberle, were not offered to prove that defendant committed another crime. Rather, the statements were offered to show their effect on Oberle, i.e., to explain why Oberle made efforts to find defendant. Because the out-of-court statements were not offered for the truth of the matter asserted, the statements were not hearsay, *Mesik*, 285 Mich App at 540, and their admission did not violate defendant's right of confrontation, *Chambers*, 277 Mich App at 10-11. There was no plain error.

Defendant next challenges the testimony of Heidi Reinero that the victim told her over the telephone that "Jim" beat him up and that, after he fed "Jim" a hot dog, "all of a sudden ['Jim'] went crazy." Defendant claims that the victim's out-of-court statements were inadmissible hearsay and that their admission violated his right of confrontation.

As already stated, the Confrontation Clause bars the admission of testimonial statements unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination. *Crawford*, 541 US at 68. A statement is testimonial if made during a formal court proceeding or a police interrogation, *id.*, or "under circumstances indicating that [its] 'primary purpose' was to 'establish or prove past events potentially relevant to later criminal prosecution,'" *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008), quoting *Davis v*

Washington, 547 US 813, 822; 126 S Ct 2266; 165 NW2d 224 (2006). Here, the victim's statements were nontestimonial. The statements were made informally to Reinero, a friend, over the telephone. In addition, the circumstances, especially the fact that the victim refused Reinero's request to summon medical personnel or to contact the police, indicate that the statements were not made in contemplation of later criminal prosecution. Accordingly, the admission of the victim's out-of-court statements to Reinero identifying his attacker did not violate defendant's right of confrontation.

However, the rules of hearsay also governed the admission of the victim's out-of-court statements. See *Taylor*, 482 Mich at 378. Hearsay is not admissible except as provided by the rules of evidence. MRE 802. Even if the victim's statements were not admissible pursuant to any of the hearsay exceptions in MRE 803 and MRE 804, defendant is not entitled to have his convictions reversed, because he fails to establish that the statements affected the outcome of his trial. When interviewed by Oberle and another detective, defendant admitted that he attacked the victim after he became offended when the victim referred to him as "my bitch." Defendant's confession was played for the jury, and defendant did not contest at trial that he was the person who attacked the victim. Accordingly, any error in the admission of the victim's out-of-court statements that identified defendant as the attacker did not affect the outcome of defendant's trial. *Carines*, 460 Mich at 763.[2] There was no plain error affecting defendant's substantial rights.

Defendant also challenges the testimony of Jesus Ramirez, the victim's brother, that "[a]ll the blood was in the bathroom where he murdered my brother. He did a vicious crime. He should have never killed my brother like that." He further challenges Ramirez's testimony that the victim "never had no problem with nobody until he met [defendant]." According to defendant, the trial court should have excluded this testimony because it was inadmissible hearsay, not based on personal knowledge, and offered an opinion on defendant's guilt.

There is no merit to defendant's claim that Ramirez's testimony violates the hearsay rules. By definition, hearsay is an out-of-court statement. MRE 801(c). Ramirez did not testify to any out-of-court statement made by any person. Accordingly, there was no hearsay in Ramirez's testimony.

A witness may only testify to matters to which he has personal knowledge. MRE 602. In addition, a lay witness may only testify to an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue." MRE 701. Here, nothing in Ramirez's testimony

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[2] We find no merit to defendant's claim that because the jury convicted him of second-degree murder rather than felony murder, the jury must have disregarded his confession. In his confession, defendant acknowledged that he stole a stereo from the victim's apartment but he never indicated that the theft of the stereo was his motive for attacking the victim. Rather, defendant stated that he attacked the victim because the victim called him "my bitch." Defendant's confession does not necessarily support a finding of felony murder.

established that he had personal knowledge of who killed the victim. Ramirez did not witness the attack, nor did he speak with the victim after the attack occurred. Thus, Ramirez's testimony identifying defendant as the victim's killer was a conclusory statement unsupported by personal knowledge.

Nonetheless, the admission of this improper testimony does not require reversal of defendant's convictions. In light of defendant's confession, the testimony of Ramirez did not affect the outcome of the trial. In addition, defendant fails to explain his claim that the "incendiary statements" prejudiced the jury against him and guaranteed that it would not reach a verdict of voluntary manslaughter. The jury was instructed not to let sympathy influence its decision. A jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Again, there was no plain error affecting defendant's substantial rights.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that trial counsel was ineffective for failing to object to the testimony of Oberle, Reinero, and Ramirez. We disagree.

Defendant did not move for a new trial or a *Ginther*[3] hearing. Where claims of ineffective assistance of counsel have not been preserved, our review of the claims is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted).

Because the out-of-court statements testified to by Oberle were not hearsay and did not violate defendant's right of confrontation, trial counsel was not ineffective for failing to object to the statements. Counsel is not required to make a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

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[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Even if trial counsel's failure to object to the testimony of Reinero and Ramirez fell below objective standards of reasonableness,[4] counsel's deficient performance did not prejudice defendant. Given defendant's admission that he was the one who attacked the victim, there is no reasonable probability that had counsel objected to the testimony of Reinero and Ramirez, the outcome of defendant's trial would have been different. *Uphaus*, 278 Mich App at 185. Defendant was not denied the effective assistance of counsel.

IV. OTHER ACT EVIDENCE

Defendant contends that the trial court erred in admitting evidence of his robbery of Dale Dewitt. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when it chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant first claims that the trial court erred in admitting the other act evidence because the prosecution failed to provide pretrial notice of its intent to introduce the evidence. Generally, the prosecution is required to provide pretrial notice of its intent to introduce evidence of other crimes, wrongs, or acts. MRE 404(b)(2). It may provide notice during trial if the court excuses pretrial notice for good cause shown. *Id.* In *People v Dobek*, 274 Mich App 58, 87; 732 NW2d 546 (2007), this Court held that the prosecution's failure to provide pretrial notice did not prejudice defendant where defense counsel was aware of the other acts before trial. Similarly, in this case, defendant was not prejudiced by the prosecution's failure to provide pretrial notice, where trial counsel represented defendant in the criminal prosecution for the Dewitt robbery.

Defendant also claims that the evidence of the Dewitt robbery was not offered for a proper purpose and was more prejudicial than probative. Other act evidence is admissible if the evidence (1) is offered for a proper purpose, (2) is relevant, and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice. MRE 404(b)(1); *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In addition, upon request, a trial court may issue a limiting instruction. *Knox*, 469 Mich at 509.

Other act evidence is not admissible to prove the character of a person to show action in conformity therewith. MRE 404(b)(1). However, it may be introduced for a noncharacter purpose, such as proof of motive, opportunity, intent, preparation, and common plan or scheme. *Id.*; *People v Seals*, 285 Mich App 1, 11; 776 NW2d 314 (2009). Here, the other act evidence, evidence that defendant robbed Dewitt within hours of attacking the victim and stealing the

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[4] The actions of counsel are presumed to be based on reasonable trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Because the identity of the victim's attacker was not in dispute, trial counsel's failure to object to statements that identified defendant as the attacker may have been reasonable trial strategy.

victim's stereo, was admissible to prove defendant's intent. Defendant's theory at trial was that he attacked the victim after the victim referred to defendant as "my bitch," and that he took the stereo as an afterthought. In contrast, the prosecution argued that defendant intended to attack the victim and was motivated to do so by the intent to steal the victim's property. Although the evidence of the Dewitt robbery was not identical to the facts of the present case, the facts of the robbery were sufficient to support the prosecution's theory. We reject defendant's claim that because the jury acquitted defendant of felony murder, the Dewitt robbery showed no proof of a similar intent. Defendant has not provided us with any authority to support the proposition that a jury's verdict should play any role in determining the propriety of a trial court's evidentiary decision. The other act evidence was admitted for a proper purpose.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The other act evidence was probative of defendant's intent in attacking the victim. Furthermore, the trial court instructed the jury that it could only consider the other act evidence to determine whether defendant intended to commit an armed robbery or larceny and whether the act that caused the victim's death occurred during the armed robbery or larceny. The jury was further instructed that it could not use the other act evidence to determine that defendant had a bad character and that he acted in accordance with that character. Such limiting instructions protect a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). See also *Abraham*, 256 Mich App at 279 (stating that a jury is presumed to follow its instructions). Under the circumstances, the probative value of the evidence of the Dewitt robbery was not substantially outweighed by unfair prejudice.

V. OFFENSE VARIABLE 3

Defendant argues that the trial court erred in scoring 50 points for offense variable (OV) 3, MCL 777.33. Although we agree, defendant is not entitled to be resentenced.

We review this unpreserved scoring issue for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Fifty points may be scored for OV 3 if "[a] victim was killed." MCL 777.33(1)(b). However, the instructions for OV 3 provide that 50 points may be scored only "if death results from the commission of a crime and the offense . . . involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive" and the offender was under the influence of alcohol or drugs. MCL 777.33(2)(c). Thus, although the victim was killed and defendant admitted that he was under the influence of alcohol when the offense occurred, OV 3 could not be scored at 50 points because the offense did not involve the operation of a vehicle. The trial court plainly erred in scoring 50 points for OV 3.

As defendant concedes, the proper scoring of OV 3 is 25 points, not zero. Twenty-five points may be scored for OV 3 when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). In *People v Houston*, 473 Mich 399, 405-410; 702 NW2d 530 (2005), our Supreme Court held that 25 points is the proper score for OV 3 when a victim is killed but the instructions for OV 3 preclude a higher point score. Defendant contends

that *Houston* was wrongly decided, but until the Supreme Court overrules *Houston*, we are bound to follow it. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

An error in scoring the sentencing guidelines only requires resentencing if the error affected the recommended minimum sentence range. *People v Phelps*, 288 Mich App 125, 136; ___ NW2d ___ (2010). Here, the trial court's error in scoring OV 3 did not affect the minimum sentence range. Even when 25 points are subtracted from defendant's OV score, the recommended minimum sentence range remains the same. Accordingly, defendant is not entitled to be resentenced.

VI. MINIMUM SENTENCE FOR LARCENY FROM A PERSON

Defendant contends that he is entitled to be resentenced for his conviction of larceny from a person because the imposed minimum sentence of 80 years' imprisonment is an upward departure from the maximum minimum sentence permitted under the sentencing guidelines for a class D crime. We disagree.

We review this unpreserved scoring issue for plain error affecting defendant's substantial rights. *Sexton*, 250 Mich App at 227-228.

This Court addressed the same sentencing issue in *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005). In *Mack*, we concluded that where a defendant is convicted of multiple offenses and receives concurrent sentences, the trial court is only required to score the sentencing guidelines for the offense having the highest crime class. *Id.* at 125-129. The sentence for the offense having a lesser crime class can exceed the minimum sentence range recommended by the guidelines for that offense, without requiring the trial court to articulate substantial and compelling reasons for the departure, because the lesser-class offense is not required to be scored. *Id*. Thus, pursuant to *Mack*, defendant's argument that he is entitled to be resentenced for his conviction for larceny from a person fails.[5] The trial court did not plainly err in imposing a minimum sentence of 80 years' imprisonment.

VII. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant first claims that the trial court allowed the prosecution to admit his post-arrest statements without first providing him a safeguard to prevent against self-incrimination. It appears that defendant is claiming the trial court should have held a *Walker*[6] hearing before admitting his post-arrest statements.

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[5] Although Justice MARKMAN has expressed disagreement with the Court's decision in *Mack*, see *People v Warren*, 485 Mich 970, 970-971; 774 NW2d 697 (2009) (MARKMAN, J., dissenting), we are bound to follow *Mack* until it is modified or overruled by the Supreme Court. MCR 7.215(C)(2), (J)(1); *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007).

[6] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Because this issue was not raised below, we review it for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

The purpose of a *Walker* hearing is to determine the voluntariness of a statement given by the defendant to the police. *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). Here, after he was arrested, defendant was informed of his *Miranda*[7] rights and he waived his rights. Nothing in the record suggests that defendant's subsequent statements to Oberle were involuntary, meaning that his statements were not the product of a free and unconstrained choice, *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). In fact, on appeal, defendant does not even claim that his statements were involuntary. Accordingly, there is no basis to hold that the trial court plainly erred in failing to hold a *Walker* hearing.

Defendant next argues that he was denied the effective assistance of counsel by numerous failings of trial counsel. We disagree.

Because a *Ginther* hearing has not been held on defendant's claims, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant asserts that trial counsel was ineffective for (1) not conducting a pretrial investigation, (2) not reading the discovery material provided by the prosecution, and (3) only visiting him four times in jail. None of these claims are supported by the lower court record. Defendant also asserts that trial counsel was ineffective for failing to make "timely objections." Defendant, by not identifying the objections that he believes trial counsel should have made, has abandoned the claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant further argues that trial counsel was ineffective for failing to move for a *Walker* hearing. However, defendant does not claim, and the record does not support, that his statements were involuntary. Based on the record, any motion for a *Walker* hearing would have been denied. Trial counsel was not ineffective for failing to a make a futile motion. *Fike*, 228 Mich App at 182.

Finally, defendant contends that the prosecution abused its power when it charged him with felony murder and armed robbery because the evidence did not support the charges. We disagree.

We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

The prosecution has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). The test for prosecutorial overcharging is not whether the prosecution's choice of charges was unreasonable or unfair, but whether the charging decision was made for reasons that were unconstitutional, illegal, or ultra

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[7] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

vires. *People v Barksdale*, 219 Mich App 484, 488-489; 556 NW2d 521 (1996). Defendant asserts that the charges were based on "false evidence" because the prosecution knew that the subarachnoid hemorrhage that caused the victim's death was not caused by him. Defendant's assertion is based on a statement Reinero gave during a police interview. However, we note that the Reinero interview is not part of the lower court record. A party may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). The forensic pathologist testified that the cause of death was blunt force trauma to the victim's head and torso, and that the victim suffered six significant blows to the head, which caused bleeding on the inside and outside of the brain. Nothing in the pathologist's testimony suggests that the victim died of injuries suffered before August 7, 2008. Defendant also complains about the prosecution's use of his post-arrest statements and the evidence of the Dewitt robbery. However, as discussed previously in this opinion, evidence of the Dewitt robbery was properly admitted under MRE 404(b) as evidence of defendant's intent and nothing in the record suggests that defendant's post-arrests statements were involuntary. We find no merit to defendant's argument that the prosecutor abused its power in charging defendant with felony murder and armed robbery.[8]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

[8] We note that defendant makes numerous other arguments, including (1) the verdict of second-degree murder was not supported by sufficient evidence, (2) the testimony of a forensic scientist concerning the blood splatter in the victim's apartment should have been excluded under MRE 403, and (3) the prosecutor made improper comments during his closing argument. These issues are not properly presented for our review, as they were not identified in the question presented, MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009), and we decline to address them.